

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Petition of Megadent, Inc., d/b/a Megadent
Labs, Inc., d/b/a Megadent, d/b/a Megadent
Laboratories, Kim Martinez (and John Does)
For Waiver of Section 64.1200(a)(4)(iv) of the
Commission's Rules

CG Docket No. 02-278

CG Docket No. 05-338

**REPLY COMMENTS OF MEGADENT, INC., d/b/a MEGADENT LABS, INC., d/b/a
MEGADENT, d/b/a MEGADENT LABORATORIES AND KIM MARTINEZ**

Petitioners Megadent, Inc., d/b/a Megadent Labs, Inc., d/b/a Megadent, d/b/a Megadent Laboratories, and Kim Martinez (together, "Megadent") submit this Reply to comments filed by Schultz & Associates ("Plaintiffs") on Megadent's Petition for Waiver of the Commission's Rule on Opt-Out Notices on Fax Advertisements. Megadent requests the Federal Communications Commission (the "Commission") grant it a retroactive waiver pursuant to the Commission's October 30, 2014 order, FCC Order 14-164 ("Fax Order").

I. Megadent filed its petition for a waiver expediently and within a reasonable time after being served with a class action lawsuit in May 2015.

The Fax Order requests that petitioners make "every effort" to pursue a retroactive waiver on or prior to April 30, 2015. Plaintiffs criticize Megadent for filing its request after that date, but Megadent was served with the Lawsuit on May 13, 2015. Of course Megadent did not pursue a retroactive waiver from the FCC prior to being sued. After being served with the Lawsuit, Megadent retained counsel, began investigating the allegations, and filed its petition for waiver on June 24, well before filing a responsive pleading or conducting any discovery in the Lawsuit. The Fax Order does not establish a rigid deadline of April 30, 2014, presumably for

this very reason, in contemplation of those sued after that date.¹ Megadent has acted diligently and filed its request within a reasonable amount of time after being served.

II. Good cause exists for a retroactive waiver.

Megadent is similarly situated to the petitioners to whom the Commission granted retroactive waivers in the Fax Order. Plaintiffs argue otherwise, because Megadent did not submit evidence of confusion over whether solicited fax advertisements must include the opt-out notice.² This argument ignores the crux of the Fax Order and attempts to hold Megadent to an overly burdensome standard not contemplated by the Commission.

The Fax Order makes clear that evidence of actual, subjective confusion is not required. Rather, the Commission recognized widespread confusion and misplaced confidence about the opt-out notice requirement. The Commission found that this confusion "*presumptively establishes*" good cause for a retroactive waiver, and generally recognized a "confusing situation for businesses."³ The "confusing situation" – not individual evidence of a particular petitioner's confusion – warranted a waiver. Notably, the Commission made no factual findings concerning individual confusion on the part of the original petitioners, nor did it describe any evidentiary burden regarding the petitioners' state of mind. Plaintiffs' class definition includes all faxes sent in the four years prior to the filing of the Lawsuit, and thus includes the period of "confusion" addressed by the Fax Order. Like other petitioners, Megadent should not be required to demonstrate its own specific confusion.

III. Conclusion

For the foregoing reasons, along with those set forth in Megadent's original Petition, Megadent requests that the Commission grant Megadent a limited retroactive waiver of Section

¹ See Fax Order, ¶ 2.

² Plaintiffs' Comments at pp. 2-3.

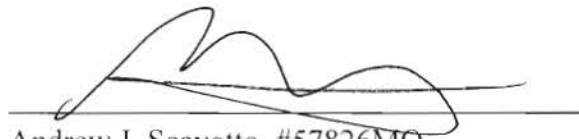
³ Fax Order at ¶ 26.

64.1200(a)(4)(iv) for any solicited fax sent by Megadent (or on its behalf) after the effective date of the applicable regulation, Section 64.1200(a)(4)(iv), and for such other and further relief the Commission deems just and proper

Dated: July 17, 2015

Respectfully submitted,

STINSON LEONARD STREET LLP

A handwritten signature in black ink, appearing to read 'Andrew J. Scavotto', is written over a horizontal line.

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